

In the Supreme Court

Appeal from the Court of Appeals

O'Connell, P.J., and White and Smolenski, JJ.

THE TITLE OFFICE, INC.,
a Michigan Corporation,

Plaintiff-Appellee,

v

Docket No: 121177, 121178

FULTON J. SHEEN, Allegan County Treasurer
SANDRA THATCHER, Branch County Treasurer
GARY LEININGER, Hillsdale County Treasurer
NANCY HICKEY, Ionia County Treasurer
JANET ROCHEFORT, Jackson County Treasurer
HERMAN DRENT, Kalamazoo County Treasurer
DIANNE H. HARDY, Livingston County Treasurer
KAREN MAKAY, Van Buren County Treasurer,

Court of Appeals Case No.
225377

Circuit Court Case No.
99-017173-CZ

Defendants-Appellants.

REPLY BRIEF ON APPEAL – APPELLANTS

ORAL ARGUMENT REQUESTED

Bonnie G. Toskey (P30601)
Timothy M. Perrone (P37940)
Cohl, Stoker, Toskey & McGlinchey, P.C.
Attorneys for Defendants/Appellants
Fulton J. Sheen, Allegan County Treasurer
Gary Leininger, Hillsdale County Treasurer
Nancy Hickey, Ionia County Treasurer
Janet Rochefort, Jackson County Treasurer
Herman Drenth, Kalamazoo County Treasurer
Dianne H. Hardy, Livingston County Treasurer
601 North Capitol Ave.
Lansing, MI 48933
517/372-9000

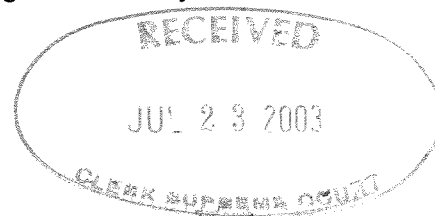


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REPLY BRIEF ON APPEAL – APPELLANTS

INTRODUCTION

This Reply Brief is submitted on behalf of Defendants/Appellants Fulton J. Sheen, Allegan County Treasurer; Gary Leininger, Hillsdale County Treasurer; Nancy Hickey, Ionia County Treasurer; Janet Rochefort, Jackson County Treasurer; Herman Drenth, Kalamazoo County Treasurer; and Dianne H. Hardy, Livingston County Treasurer, in response to the filing of Plaintiff/Appellee's Brief on Appeal.

The issue before this Court is whether the fees charged by a County Treasurer for electronic copies of tax records requested under FOIA fall within either of the two exceptions to the FOIA cost provisions set forth in MCL 15.234(4); MSA 4.1801(4)(4), where the Transcripts and Abstracts of Records Act (TARA), MCL 48.101; MSA 5.711, specifically authorizes the sale of public records, and/or provides the amount of the fee for providing the public records.

The issue in this case is not a denial of the documents sought, but rather is about the fee Defendants/Appellants and other County Treasurers may charge for producing electronic (computer) copies of delinquent tax records. The Appellant County Treasurers assert that they are required to charge the fees set forth in the TARA, regardless of the format of the requested tax records.

ARGUMENT

I. FOIA PROVIDES AN EXCEPTION TO ITS COST PROVISIONS WHERE ANOTHER STATUTE SPECIFICALLY PROVIDES ANOTHER FEE FOR PROVIDING COPIES OF PUBLIC RECORDS

The Court of Appeals below correctly opined that the FOIA cost provisions do not

apply here because the TARA specifically provides the amount of the fee for providing a copy of the public record. See *The Title Office, Inc v Van Buren County Treasurer*, 249 Mich App 322, 337; 643 NW2d 244 (2002). However, that panel was constrained to follow earlier precedent with which it disagreed, i.e., *Oakland County Treasurer v The Title Office, Inc*, 245 Mich App 196; 627 NW2d 317 (2001).¹

There can be no question that FOIA sets out a specific exception to its nominal fee provisions in MCL 15.234(4); MSA 4.1801(4)(4):

- (4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, **or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.**

Defendants/Appellants maintain that 1895 PA 161, the Transcripts and Abstracts of Records Act, MCL 48.101; MSA 5.711, is the statute which authorizes the sale, or otherwise requires a specific fee for providing a copy of the public tax records by County Treasurers and is, therefore, controlling. Specifically, MCL 48.101; MSA 5.711 provides:

County treasurer's record, transcript fees; disposition

Sec. 1. (1) A county treasurer shall make upon request a transcript of any paper or record on file in the treasurer's office for the following fees: (emphasis added)

- (a) For an abstract of taxes on any description of land, 25 cents for each year covered by the abstract.

¹The Court of Appeals in the *Oakland County* case held that the form in which the copies are to be reproduced (i.e., paper copies versus electronic copies) controls the application of the fee provisions of the Transcripts and Abstracts of Records Act. Hence, entities who request paper copies of records must pay the fees set forth in the Transcripts and Abstracts of Records Act, while the fees for entities which request electronic (computer) copies of these same records are controlled by the fee provisions of FOIA.

- (b) For an abstract with statement of name and residence of taxpayers, 25 cents per year for each description of land covered by the abstract.

* * *

- (d) For 1 copy of any paper **or document** at the rate of 25 cents per 100 words.
- (e) For each certificate, 25 cents.
(Emphasis supplied).

Because this Act **specifically** mandates the amount of the fee to be charged for providing a copy of a public tax record, Defendants/Appellants are required to charge that amount. Any request for tax records under this Act is necessarily exempt from the fee structure set forth under FOIA.

A. Appellee's Argument Elevates Form Over Substance.

Appellee's argument on this appeal can be distilled as one of form over substance. Appellee argues that it did not request a written 'transcript' of an 'abstract of taxes' on a parcel of property, but rather a computer tape of the tax information. As such, Appellee argued that the requested information -- in computer format -- does constitute a "record" under FOIA, but **does not** constitute a transcript of a "record" or "document" under the Transcripts and Abstracts of Records Act.

As suggested by this Court's Order Granting Leave to Appeal, the meaning of the word "transcript" is of major significance in the decision of this issue. The parties have submitted numerous dictionary definitions of the word "transcript" as it has been defined from the time of the enactment of the TARA. The various definitions invariably provide that a "transcript" is a "copy of any kind," not necessarily limited to a paper document. See,

e.g., Webster's International Dictionary (1890). Moreover, Appellants cited to numerous cases in which the words in a statute are presumed to apply not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter, e.g., technological advances. See, *Lakehead Pipeline Co, Inc v Dehn*, 340 Mich 25; 64 NW2d 903 (1954).

A FOIA request for a public record or documents is in all cases a request for a copy of the public record or documents. In this case, Appellee made its FOIA request for a copy of the public tax records maintained by the County Treasurers. This request was viewed as a request for a transcript, i.e., a copy, of the tax records. It was immaterial that the request was for a copy of the records in computer format, as the term "transcript" means "a copy of any kind."

Appellee sidesteps this fact when it argues that it did not request a transcript, but rather a copy of a magnetic tape containing electronic data files. The Treasurers are only too willing to comply with the request for the records in the format requested. They are not in any way attempting to fulfill the request with paper documents, as was the case in *Farrell v City of Detroit*, 209 Mich App 7; 530 NW2d 105 (1995). There is no question that Appellee is entitled to obtain a copy of the requested records in the format of its choice. The holding in *Farrell* is simply not implicated here. Nor is the case law from Illinois, New York, and Ohio as cited by Appellee.²

The format of the requested public records is not relevant to this issue. But the

²*AFSCME v County of Cook*, 555 NE2d 361 (Ill, 1990); *Brownstone Publishers, Inc v New York City Dept of Buildings*, 440 NYS2d 564 (Sup Ct, 1990), *aff'd* 560 NYS2d 642 (NY App Div, 1990); and *Athens County Property Owners Assoc, Inc v City of Athens*, 619 NE2d 437 (Ohio App, 1992).

content of the requested records is relevant, because the TARA specifically, i.e., explicitly, provides an established fee for copies of tax records, regardless of the format in which the information is copied. Appellee is asking for a copy of the exact same written words and figures contained in the Treasurers' public records. Whether that request is fulfilled by a paper document such as a photocopy, or in an electronic format such as a computer tape or disk, the information contained within the public record itself is what is being conveyed.

The Court of Appeals below clearly stated that "the language of the TARA is broad enough to cover electronic copies of records kept on file in the offices of the county treasurers." *Van Buren County Treasurer, supra*, 249 Mich App at 337. The Court of Appeals further stated that the TARA clearly falls within the second exception to the FOIA cost provisions," i.e., where the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute. *Id.*

The Court of Appeals below also recognized that Appellee's position, as upheld by another Court of Appeals panel in the *Oakland County* decision, would create "an ironic dichotomy" in the fee schedule. *Van Buren County Treasurer, supra*, 249 Mich App at 337 n 10. That is, a member of the public requesting a computer print-out of a property tax record would be compelled to pay the TARA's mandatory fee, while the same person requesting a computer disk or tape, containing the identical information, would not. *Id.*

B. The Treasurers are Required to Charge the Statutorily Mandated Fees Set Forth in the TARA.

There is no question that the tax records requested here are public records, compiled by using taxpayer dollars. They always have been, even before the enactment of the TARA in 1895. However, the Legislature saw fit to require the payment of a fee in

order for a member of the public to obtain a copy of that specific information. The Legislature was certainly aware of the TARA when it enacted the FOIA in 1976, including the exceptions to the FOIA fee provisions.

Appellee relies heavily upon the opinion rendered in its favor by Ottawa Circuit Judge Post in *The Title Office, Inc v Ingham County Treasurer*, Ottawa Circuit Court Case No. 97-28553-CZ. However, as Appellants pointed out in their initial Brief, the opposite conclusion was reached by Washtenaw Circuit Judge Swartz in *Washtenaw County Treasurer v The Title Office, Inc*, Washtenaw Circuit Court Case No. 99-10618-CZ, as well as by Court of Appeals Judges Smolenski and O'Connell in this case, which opinions could not be given effect due to the precedential nature of the *Oakland County* decision.

Appellee accuses the Treasurers of seeking a "windfall," or operating a "profit center" by requiring payment of the fees set forth in the TARA. This is patently false, as the Treasurers have insisted all along that they are required by the TARA to charge the statutorily mandated fees. They are not bound to waive or minimize those fees.

Appellee argues that the addition of Subsection 5 to the TARA mandates a finding that the TARA does not fall within the exceptions to the FOIA fee provisions.³ This argument is misleading in several respects.

First, none of the Counties presently before the Court fall within the terms of Subsection 5. Further, by allowing certain charter counties to charge a "different" fee, it is

³MCL 48.101(5); MSA 5.711(5) provides:

A charter county with a population of more than 2,000,000 may impose by ordinance a different amount for the fees prescribed by this section. A charter county shall not impose a fee which is greater than the cost of the service for which the fee is charged.

clear that the fee to be charged may be greater than the fees to be charged by other counties. This militates in support of a finding that the fees as set forth in the TARA are actually the “minimum” fees to be charged for copies of tax records, even if the cost to produce the records is less than the statutory fee. The limitation on charter counties not to charge a fee which is greater than the cost of the service for which a fee may be charged does not, in any way, restrict the ability of any county to charge the minimum fees set forth in the TARA, regardless of the ease or difficulty of complying with the record request.

The Treasurers here are willing to provide the public records requested, in the format requested, but can not ignore the substance of the information contained therein, for which a particular fee has been specifically provided by the TARA. The Treasurer’s position here does not “frustrate” the purpose and goals of FOIA. On the contrary, it is the Treasurers who seek to give effect to the FOIA provisions which expressly except certain record requests from the basic FOIA incremental cost provisions. To the extent that Appellee deems this situation anomalous, its remedy is in the Legislature, which can enact appropriate amendments to FOIA and/or the TARA.

CONCLUSION

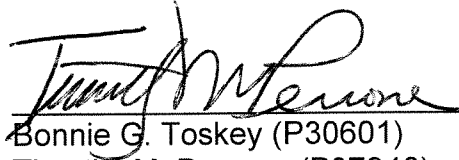
For all the foregoing reasons, Defendants/Appellants respectfully request that this Honorable Court reverse the Opinion and Order of the Court of Appeals and the Opinion and Order of the Livingston Circuit Court, and grant Defendants/Appellants such other and further relief as justice may require.

Respectfully submitted,

COHL, STOKER, TOSKEY & McGLINCHEY, P.C.

Date: July 23, 2003

By:

A handwritten signature in black ink, appearing to read "Timothy M. Perrone", written over a horizontal line.

Bonnie G. Toskey (P30601)

Timothy M. Perrone (P37940)

Attorneys for Defendants/Appellants

601 North Capitol

Lansing, MI 48933

(517) 372-9000